

in the
Supreme Court
of the
United States

OCTOBER TERM 1976

CASE NO. — **76-1440**

ALEX GOLDSTEIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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CASE NO. _____

ALEX GOLDSTEIN,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE FIFTH CIRCUIT

Petitioner, ALEX GOLDSTEIN, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-styled case on February 2, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A hereto, infra (pp. A1 - A9) is reported at _____ F.2d _____ (5th Cir. 1977).

JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1977, Appendix A, *infra* (p. A10). A timely petition for rehearing was denied on March 17, 1977. Appendix B, *infra* (p. A11-12). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 22, *Rules of the United States Supreme Court*.

QUESTIONS PRESENTED

1. Whether the trial court erred to the substantial prejudice of the Petitioner and denied him due process and equal protection of the law and the right to compulsory process over witnesses when in a conspiracy and a 41 count mail fraud prosecution it denied Petitioner's trial motion to depose two crucial defense witnesses whose testimony was demonstrably material to rebutting the conspiracy alleged against the Petitioner, and the conspiracy was the only charge of which the Petitioner was convicted?

2. Whether the trial court erred to the substantial prejudice of the Petitioner and denied him due process of law and a fair trial when it permitted the government to argue and comment in summation, over objection, that the defendant failed to testify which, when considered *in tandem* with the trial court's refusal to allow the trial depositions of the two defense witnesses pertinent to the conspiracy allegation, compounded Petitioner's disability to rebut the conspiracy charge or present an effective defense?

STATUTES INVOLVED

The Federal statutory provisions involved, 18 U.S.C. 371 and 1341, are set forth in Appendix C and D, *infra* (pp. A13 - A14). Rule 15(a) is printed in Appendix E.

STATEMENT OF FACTS

This is a prosecution under statutes familiarly known as the Mail Fraud Statute, 18 U.S.C. 1341, and the conspiracy statute, 18 U.S.C. 371. Petitioner was indicted and tried in a 42 count indictment with several other defendants for conspiracy to devise and the devising and execution of a scheme to defraud by use of the United States mails. The trial was held in the United States District Court for the Southern District of Florida (Fulton, D.J.). Petitioner and three other defendants were found guilty, although Petitioner was convicted only of the conspiracy charge and was acquitted of all of the numerous substantive charges. Petitioner was sentenced to imprisonment for a term of two (2) years. Of the other convicted defendants, two received a five (5) year prison term and the remaining defendant, who did not appeal, a term of probation.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the convictions of all appealing defendants. See A1 - A9. The Court (Gwin, Gee and Fay, JJ.) concluded that there was no demonstrable abuse of discretion in the trial court's denial of (a) Petitioner's trial *Rule 15 (a)* motion for court authorization to depose two foreign — national defense witnesses and (b) although the prosecutor's comments specifically and exclusively named the Petitioner as the party who "remained silent"

or "failed to testify" the prosecutor's remarks amounted to a comment on the failure of the defense, not the defendant, to testify.

The indictment charged a conspiracy well over a three year duration and, as it pertained to Petitioner, from January 1, 1970 until February 1, 1971. The conspiracy alleged had as its object the devising and perpetration of a complicated, international scheme to defraud investors emanating from a shell company called First Liberty Fund, a sham operated by a now notorious swindler, Phillip Morrel Wilson.

Wilson and another unindicted co-conspirator, Jack Axelrod created the image of a mutual fund which, in reality, was worthless and penniless. Both the sham fund and its "management company" were established in the Bahamas and swindled unwary investors through a series of world-wide inter-related and connecting companies which also, in reality, were worthless shams. (See Tr. 70-80; 89-90; 1851-1900; 2081; 2137-2139).

In order to assist them in that portion of their scheme to swindle European investors, the originators of the fraud obtained the assistance of another swindle, Transcontinental Casualty Insurance Company, Ltd., to verify the worth of the fund shares by "insuring" the purchased stock. Eventually, the initiators of the swindle came in contact with a German brokerage house called Northern United States Investors (NUSI) owned by the brothers, Volker and Jurgen Reible, and the Petitioner who was a securities advisor and salesman.

The first business contact between Petitioner, NUSI and the original schemers occurred in July of 1970, and a sales meeting was thereafter held on July 27, 1970. Petitioner was present at this meeting along with the business associates of Petitioner, the Reible brothers, the two witnesses sought to be deposed in the motion and order now sought to be reviewed.

From the initial meeting, however, Petitioner began questioning everything, (Tr. 438-430), since that was his first contact with an offshore fund. (Tr. 3080-3097). When on August 15, 1970, a German newspaper "Der Aktioner" publicly questioned the soundness of First Liberty Fund (Tr. 469), Petitioner contacted the originators in the United States questioning the soundness of fund and the accuracy of the news article. (Tr. 479).

Prior to trial and at his own expense, Petitioner deposed several witnesses in Europe, including Germany. During the trial when the Government's "theory of criminal culpability" as to Petitioner was taking shape, Petitioner moved the trial court for authorization to depose the Reible brothers to gain their exculpatory testimony to aid his defense and establish his innocence. In doing so, Petitioner proffered that the proposed deponents would establish that (a) the European bank accounts to which the prosecution addressed its evidence was not under Petitioner's control but was solely controlled by the Reible brothers; (b) Petitioner had no disbursing authority at the custodian bank for First Liberty Fund for the pertinent period of time; and (c) the proposed deponent's testimony would have contradicted a substantial portion of the Gov-

ernment's case, especially the facts from which the Government urged the inference of Petitioner's alleged guilty knowledge of what was transpiring. (See Tr. 552-557).

But in response to Petitioner's motion the Government countered that the Reible brothers, being charged in the very indictment against Petitioner, were fugitives and thus excludable from deposition. In addition, the Government refused to attend any deposition of the proposed witnesses and refused to dismiss the brothers from the indictment although it knew that the brothers were not extraditable from Germany. In short, the Government prosecutors unilaterally controlled the very status of the Reible brothers which they then claimed to be the sole basis disqualifying them from submitting to deposition. The results: while the Government concededly made deals with admitted conspirators whose testimony, also concededly, circumstantially incriminated the Petitioner, the Government also unilaterally manipulated the posture of the Reible brothers so as to preclude Petitioner from employing their testimony in his defense.

Compounding this manipulative deprivation the Government, in summation, commented on Petitioner's silence by saying at various stages of its final argument:

"Did Goldstein say, hey, stop, no more sales? Did he say 'Lets freeze the money, all money coming in and hold it for the benefit of the First Liberty Fund share holders?' No, he did not do that. (T. 122).

". . . Mr. Goldstein is trying to say that he is so naive, . . . (Tl. 67).

"Now, what did Mr. Goldstein and the others do. Well, they didn't tell Reigler. (Tl. 69).

"Mr. Goldstein met with Mr. Mattauch before the Frankfort meeting. He never told Mr. Mattauch about First Liberty being a fraud. (Tl.69).

"They never told anyone, ladies and gentlemen. (Tl. 69).

"There is no evidence in this case, one way or the other, as to who had the power to sign the checks on the NUSI account at the Swiss bank corporation, and there is no evidence in this case one way or another as to what happened to the money that was in that account." (Tl. 128).

The foregoing are far from oblique comments on the *defense's* failure to call witnesses or produce evidence. By directly identifying the Petitioner, the references clearly constitute comments on a defendant's silence and adversely draw from the absence the very testimony which would have been produced by Petitioner had the Government not, unilaterally and with unbridled discretion, manipulated the Reible brothers status as co-defendants and refused to consent to their depositions.

As indicated above, the Court of Appeals for the Fifth Circuit affirmed Petitioner's conviction but makes no use of the District Court's phrase "the Reible brothers are indicted . . . (co-defendants of Goldstein) charged as defendants in many of the counts of this indictment, but are beyond the jurisdiction of this Court and the reach of the government . . . " The Court of Appeals affirms on the

ground that Petitioner "inexcusably delayed" in requesting the depositions of the Reible brothers (Appendix A) and there was no abuse of discretion in denying the Rule 15 motion made three weeks into the trial. It also affirms on the ground that the prosecutor's comments were on the failure of the defense, as opposed to the defendant, to counter or explain evidence or testimony presented, despite the fact that the prosecutor's comments specifically and exclusively identify Petitioner by name.

REASONS FOR GRANTING THE WRIT

1. Whether the trial court erred to the substantial prejudice of the Petitioner and denied him due process and equal protection of the law and the right to compulsory process over witnesses when in a conspiracy and a 41 count mail fraud prosecution it denied Petitioner's trial motion to depose two crucial defense witnesses whose testimony was demonstrably material to rebutting the conspiracy alleged against the Petitioner, and the conspiracy was the only charge of which the Petitioner was convicted?

The first question presented concerns a fundamental question of the scope of the due process, equal protection and compulsory process over witness clauses of the Constitution of the United States. The question goes to the balancing of and the interpretation of Rule 15(a) *Federal Rules of Criminal Procedure*, prior to the recent amendments, as it pertains to deposing willing but unavailable witnesses essential to the defense on the one hand, and the unbridled, unilateral prosecutorial control over the status of potential defense witnesses by making and keeping such persons "indicted co-defendants" and,

at the same time, refusing to consent to the deposition of such persons solely on the basis that they are indicted co-defendants or fugitives. This is an area of law relating to discovery and presentation of defense evidence in a criminal proceeding to which this Court has never addressed itself although in a civil case 38 years ago, this Court summarily approved as non-abusive the denial of a motion to depose witnesses filed on the eve of trial. *Tennessee Electric Power Co., v. Tennessee Valley Authority*, 306 U.S. 118 (1939). The particular emphasis taken by the Government at trial and as approved in part by the trial court — that the proposed witnesses are "indicted co-defendants" of Petitioner are thus fugitives the taking of whose depositions would amount to an injustice — also is a question to which this Court has never addressed itself. Additionally, there is an apparent conflict between the decision of the Fifth Circuit which is the subject hereof and the United States Court of Appeals for the Second Circuit as to what facts constitute "undue delay" in moving for court authorized depositions pursuant to Rule 15(a), *supra*.

Moreover, the unbridled and unilateral manipulation of the status of the proposed deponents as indicted co-defendants by the Government and its refusal to consent to their depositions prior to trial substantially contributed to the timing of Petitioner's original motion, thus compounding the injustice worked against Petitioner and all predicated on an unconstitutional preclusion of defense witnesses in contravention of the Sixth Amendment's compulsory process over witness clause. See cases up-holding defendants' constitutional right to secure willing co-defendants' exculpatory testimony by way of severance: *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970);

United States vs. Echeles, 352 F.2d 892 (7th Cir. 1965);
United States v. Shuford, 454 F.2d 772 (4th Cir. 1971).

A. AUTOMATIC DISQUALIFICATION FROM DEPOSITION OF CO-INDICTEES IS UN- CONSTITUTIONAL

This Government's trial and appellate position strongly urged the disqualification of the Reible brothers as proposed deponents solely on the basis that they were indicted — co-defendants who, by virtue of such status, were "fugitives." Although conceding that the brothers were not extraditable, the Government refused to dismiss them from the indictment which resulted in the brothers' unwillingness to appear at trial in behalf of and exculpate Petitioner. The Government urged Ninth and Second Circuit cases in support of the proposition that deposing a fugitive would amount to an injustice. These cases, however, do not control the issue and, moreover, as applied to the facts at bar run afoul of Petitioner's Sixth Amendment right to compulsory process over witnesses. See cases *op. cit.*

In *United States v. Murray*, *supra*, a defendant moved to depose a husband/wife pair of witnesses residing in Mexico, contending that they could and would assist in his defense in testing the authenticity and probative value of business records concededly taken from their home. But contrary to that established at the trial below, the movant made no showing that the witnesses would be unable to appear at the trial. In affirming the trial court's

¹*United States v. Murray*, 492 F.2d 178, 195 (9th Cir. 1973)
United States v. Kelly, 349 F.2d 720, 769 (2nd Cir. 1965)
United States v. Gonzales, 488 F.2d 833 (2nd Cir. 1973)

denial of the motion in *Murray*, the Ninth Circuit also concluded from the record that it was, "quite unlikely that the Hernandez' would have provided any information helpful to Walker." *Id.*, at 195.

In *United States v. Gonzales*, *supra*, the Second Circuit affirmed the denial of a Rule 15(a) motion solely because the proposed deponent was not unavailable to attend the trial or prevented from attending the trial; rather the deponent was unwilling to attend the trial based upon his anticipated exposure of criminal prosecution as a co-indictee. Nevertheless, the court strongly cautioned, ". . . we believe the wiser course would have been to grant the motion . . ." citing *United States v. Hayutin*, 398 F.2d 944 (2nd Cir. 1968), *cert. denied* 393 U.S. 961 and *United States vs. Bentvena*, 319 F.2d 916, 941 (2nd Cir. 1963), *cert. denied* 375 U.S. 940. And went on to say at page 839:

" . . . although there was substantial evidence before the trial judge identifying Fiores as the co-defendant and thus in a sense as a fugitive from justice, *we do not think that this fact is dispositive. Whatever value this type of exculpation has to the fugitive co-defendant, the defendant should not be deprived of testimony which would be available by deposition.* The testimony of a fugitive from justice is rightly suspect, but not solely because of the lack of perjury sanction. *The jury is well able to weigh such testimony and in this case it might be better to let it be taken.*" (emphasis supplied)

Indeed, to preclude Rule 15(a) depositions of co-indictees solely based upon such status also establishes an unreasonable classification since co-indictees who submit to prosecution and attend trial proceedings are readily available for and allowed to give exculpatory testimony, even if such requires severing defendants otherwise subject to joint trial. See *Byrd vs. Wainwright, United States v. Echeles* and *United States v. Shuford*, all *supra*.

B. THE CONFLICT AS TO THE TERM "UNDUE DELAY" IN MOVING FOR RULE 15 (a) DEPOSITION.

The Fifth Circuit expressly affirmed the trial court's denying Petitioner's motion for depositions based upon "undue delay" citing *Heflin v. United States*, 223 F.2d 371 (5th Cir. 1955); *United States v. Whiting*, 308 F.2d 537 (2nd Cir. 1962); *United States v. Broker*, 246 F.2d 328 (2nd Cir. 1957) *cert. denied* 355 U.S. 837. But both *Whiting* and *Broker* are clearly distinguishable from the case at bar and *Heflin* and the subject decision directly conflict with *United States v. Bronston*, 321 F.Supp. 1269 (S.D.N.Y. 1971).

In *Whiting* the defense moved to depose five (5) foreign nationals one month prior to trial. Unlike Petitioner's moving papers, *Whiting's* motion and affidavits both failed to allege any more than conclusory terms concerning the unavailability of the deponents and did not demonstrate the materiality of their anticipated testimony. At a hearing on the motion, *Whiting's* counsel declined to indicate what form his defense to the charge would take and failed to demonstrate the exculpatory nature of the sought testimony. *Id.*, at page 541. When *Whiting* re-

newed the motion on the first day of trial the district court denied it saying, ". . . his papers nowhere give one tenth of what he said on the stand today, 'even though counsel for *Whiting* had known this information for two months.'"

In Petitioner's trial the defense could not learn until after the case-in-chief that the prosecution was to urge Petitioner exercised unseen and unobservable control over the businesses run and owned by the Reible brothers, whose anticipated testimony, as proffered to the court in detail, would exonerate him.

Moreover, in *United States v. Bronston, supra*, on facts identical to those below, a Federal court in New York determined as not unduly delayed, an identical request to depose foreign national witnesses essential to the defense. While previously in Europe two months before trial *Bronston's* attorney contacted "most, if not all, of the witnesses in Spain . . ." The witnesses were reportedly unwilling to travel to America to testify at trial. Fourteen days before trial *Bronston* moved for Rule 15(a) authority to depose the witnesses, which was granted subject to his paying essential costs.

Petitioner seeks review of a conviction of a single count of conspiracy, having run the gauntlet of 41 additional mail fraud counts and being acquitted of all of them, despite the deficiency of the evidence he presented in his defense. A deficiency prompted by the Government's objection to and the trial court's refusal to allow the depositions of crucial witnesses capable of rebutting the essential elements of culpable knowledge and conspiratorial intent. The precise basis for the government's objection (injustice

from deposing co-indictees) and the courts' refusal (deposing co-indictees and the undue delay in seeking Rule 15(a) authority) were based upon standards never considered by this Court. Meanwhile, the Court of Appeals herein concerned is trivializing the standards of "undue delay," to the extent of conflicting with another Federal court and all to the detriment of Petitioner's ability to exculpate himself from the one remaining charge vis-a-vis his constitutional right to call witnesses in his own defense. In a period when thoughtful people are seriously concerned about fundamental fairness and the non-manipulation of the criminal justice machinery, the events and rulings of which review is herein sought certainly warrant the attention of this Court.

2. Whether the trial court erred to the substantial prejudice of the Petitioner and denied him due process of law and a fair trial when it permitted the government to argue and comment in summation, over objection, that the defendant failed to testify which, when considered *in tandem* with the trial court's refusal to allow the trial depositions of the two defense witnesses pertinent to the conspiracy allegation, compounded Petitioner's disability to rebut the conspiracy charge or present an effective defense?

The prosecutor's summation is composed of a motley collection of inflammatory remarks inherently and patently calculated to comment on Petitioner's failure to personally testify, in contravention of this Court's mandate in *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, L.Ed.2d 106 (1965). The effect of the proscribed comments in summation, taken *in tandem* with the government's unilateral control over the status of the Reible brothers as "indicted

co-defendants" produced an unconscionable combination of (a) depriving the Petitioner of the very witnesses who could exculpate him and (b) thereafter commenting on the defendant's personal failure to explain the evidentiary deficiencies in his case.

In *Griffin, supra*, the following summation was held to be constitutionally, prejudicially infirm:

"The defendant certainly knows whether Essie Mae had this beat up appearance at the time he left her apartment and went down the alley with her.

"What kind of a man is it that would want to have sex with a woman that beat up if she was beat up if she was beat up at the time he left?

"He would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how her wig got off. He would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Villasenor because he was conscious of his own guilt and wanted to get away from that damaged or injured woman.

"These things he has not seen fit to take the stand and deny or explain.

"And in the whole world, if anybody would know, this defendant would know.

"Essie Mae is dead, she can't tell you her side of the story. The defendant won't."

In affirming the trial court's denial of Petitioner's motion for mistrial the Circuit Court deemed the prosecutor's comments as constituting comments on the failure of the defense, not the defendant, to counter to explain. Such an attenuated interpretation of the prosecutor's utterances cannot be allowed to stand, especially when the comments singularly, specifically and expressly name the Petitioner as the party who failed to take what the government considered to be appropriate action. See *comments quoted infra*.

The evil in this procedure is plain. Petitioner seeks no more than fundamental fairness within the Federal criminal process and his petition is deserving of review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should be granted by this Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the within Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed this _____ day of April, 1977 to the office of the Solicitor General, Department of Justice, Washington, D.C.

/s/ Ronald I. Strauss

RONALD I. STRAUSS,
ESQUIRE

APPENDIX

APPENDIX A

United States Court of Appeals,
Fifth Circuit.

No. 75-3362.

UNITED STATES of America,
Plaintiff-Appellee,
v.

Miles DEARDEN, Jr., Alex Goldstein
and Leonard Nikoloric,
Defendants-Appellants.

Feb. 3, 1977.

Defendants were convicted in the United States Court for the Southern District of Florida at Ft. Lauderdale, Charles B. Fulton, J., of conspiracy to transport money obtained by fraud and other crimes involved in operation of a sham offshore mutual fund, and they appealed. The Court of Appeals, Gee, Circuit Judge, held, inter alia, that the evidence supported one defendant's conviction, that the trial court properly denied motions to sever, that it properly refused to allow depositions to be taken of foreign witnesses three weeks after trial began, and that there was no fatal variance in the conspiracy charged against another defendant.

Affirmed.

App. 2

1. Conspiracy — 48.1(2)

Evidence in prosecution for conspiracy to transport money obtained by fraud presented jury question as to whether defendant had knowledge of conspiracy charged. 18 U.S.C.A. § 371.

2. Criminal Law — 878(3)

Defendant could be convicted of conspiracy even though he was acquitted on all substantive counts. 18 U.S.C.A. §§ 371, 1341, 1343, 2314.

3. Conspiracy — 40

Once defendant is connected with conspiracy, he is responsible for acts of conspiracy occurring before or after his association. 18 U.S.C.A. § 371.

4. Criminal Law — 622(2)

Admission of misdeeds by earlier coconspirators did not mandate severance of trial against defendant for conspiracy to transport money obtained by fraud. 18 U.S.C.A. § 371.

5. Depositions — 9

Trial court did not abuse its discretion in refusing defendant right to take deposition of foreign witness where motion to take such deposition came three weeks into trial. Fed.Rules Crim.Proc. rules 15, 15(a), 18 U.S.C.A.

App. 3

6. Criminal Law — 721(1)

Test to determine if there has been improper comment on failure of defendant to testify is whether or not statement was manifestly intended or was of such character that jury would naturally and necessarily take it to be comment on failure of accused to testify.

7. Criminal Law — 393(1)

Comment on failure of defense, as opposed to defendant, to counter or explain testimony presented or evidence introduced is not infringement on defendant's Fifth Amendment privilege. U.S.C.A. Const. Amend. 5.

8. Criminal Law — 721(3)

Comments made by prosecution during jury argument in defendant's conspiracy trial did not constitute wrongful references to defendant's failure to testify, but rather constituted permissible references to failure of defense to present evidence. U.S.C.A. Const. Amend. 5.

9. Conspiracy — 43(12)

There was no improper variance in prosecution for conspiracy to transport money obtained by fraud between single conspiracy charged and multiple conspiracies allegedly proved by introducing evidence of prior schemes of coconspirators. 18 U.S.C.A. § 371.

10. Criminal Law — 622 (2)

Where coconspirators of defendants in prosecution for conspiring to transport money obtained by fraud were not codefendants, and would have been just as available to testify for prosecution in separate trial involving only defendant, trial court did not abuse its discretion in denying defendant's motion to sever case from that of codefendants on grounds of possibility of transference of guilt from such coconspirators and their admitted schemes. 18 U.S.C.A. § 371.

11. Constitutional Law — 268 (2)

Defendant in criminal prosecution was not denied due process of law by reason of fact that his counsel was inconvenienced by having to travel eight miles from his office to cocounsel's office or United States attorney's office in order to share set of copies of documentary evidence introduced during trial.

Appeals from the United States District Court for the Southern District of Florida.

Before GEWIN, GEE and FAY, Circuit Judges.

GEE, Circuit Judge:

In late 1968, several businessmen not indicted in this case formed a sham offshore mutual fund called the First Liberty Fund; First Liberty was virtually valueless. Investments in First Liberty were guaranteed by Transcontinental Insurance Company, which was also a sham. In 1970, these businessmen engaged a German sales organiza-

tion (NUSI) to sell First Liberty shares to German investors, who purchased \$1.8 million worth of shares between July 1970 and February 1, 1971. Alex Goldstein was a partner in the German sales organization NUSI (his co-partners, Jurgen and Volker Reible, two German brothers, were indicted but remained in Germany beyond the jurisdiction of the trial court). Miles Dearden, Jr. bought out the originators of the First Liberty Fund and with his father became managing partner of the fund.¹ Leonard Nikoloric was a Washington, D.C. lawyer who initially became associated with First Liberty in an effort to provide financing for his own financially distressed lumber company. He was later engaged by Dearden to manage the financial affairs of First Liberty.

All three appellants were convicted of conspiracy to transport money obtained by fraud, in violation of 18 U.S.C. § 371. Dearden was also convicted on twelve substantive charges and Nikoloric on seven, of violating 18 U.S.C. §§ 1341, 1343, 2314. Goldstein received a two-year sentence on his conspiracy count; Dearden and Nikoloric received five-year sentences for conspiracy and concurrent two-year sentences for the substantive offenses.

GOLDSTEIN

I. Sufficiency of the evidence. Before a defendant can be convicted of conspiracy, the government must prove that he both had knowledge of the conspiracy and acted with an intent to further its objectives. *United States v. Miller*, 500 F.2d 751 (5th Cir. 1974). Appellant Goldstein admitted that a conspiracy existed but denied

¹Miles Dearden, Sr. was convicted on numerous counts from which he does not here appeal.

knowledge of the conspiracy and denied acting with an intent to further its objectives. He portrayed himself as an innocent businessman who was also taken in by this fraud and complains on appeal of insufficient evidence connecting him to the conspiracy. The test in such a case is whether there was sufficient evidence to go to the jury. If there was, we then apply the *Glasser v. United States* test of whether there was "substantial evidence taking the view most favorable to the government" to support the jury's verdict. 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

[1, 2] Because defendant Goldstein admitted its existence, only slight evidence was needed to connect him with the established conspiracy. *United States v. Wayman*, 510 F.2d 1020, 1026 (5th Cir. 1975). Clearly, there was sufficient evidence to send this question to the jury, and applying the *Glasser* test, we find substantial evidence to support the jury's verdict. There is no merit in appellant's argument that he could not be convicted of conspiracy when he was acquitted on all substantive counts:

If there be an agreement or confederation between two or more persons to commit an unlawful act and one or more acts are done by one or more of the coconspirators, it is immaterial whether the substantive offense is or is not consummated.

United States v. Jacobs, 451 F.2d 530, 540 (5th Cir. 1971), cert. denied, 405 U.S. 955, 92 S.Ct. 1170, 31 L.Ed.2d 231 (1972).

[3, 4] II. Denial of the motion to sever. Discretion on granting the motion to sever is firmly committed to the trial court. The test set forth in *Tillman v. United States* is stated as follows:

"[C]an the jury keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him? If so, though the task be difficult, severance should not be granted."

406 F.2d 930, 935 (5th Cir. 1969), citing *Peterson v. United States*, 344 F.2d 419, 422 (5th Cir. 1965). Goldstein complains of being convicted through guilt by association with fraudulent scheming that occurred prior to his association with First Liberty. But once a defendant is connected with a conspiracy he is responsible for acts of the conspiracy occurring before or after his association. *United States v. Reynolds*, 511 F.2d 603 (5th Cir. 1975); *United States v. Brasseaux*, 509 F.2d 157 (5th Cir. 1975); *Nelson v. United States*, 415 F.2d 483 (5th Cir. 1969), cert. denied, 396 U.S. 1060, 90 S.Ct. 751, 24 L.Ed.2d 754 (1970). Nor does the admission of the misdeeds of earlier co-conspirators mandate a severance for this appellant. *United States v. Perez*, 489 F.2d 51, 67 (5th Cir. 1973). Goldstein has not alleged the kind of compelling prejudice that would cause this court to overturn the trial judge's denial of his motion to sever.

[5] III. Deposition of foreign witnesses. Federal Rule of Criminal Procedure 15(a) reads as follows:

Whenever due to exceptional circumstances of the case it is in the interest of justice that the

testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place.

In *Heflin v. United States*, 223 F.2d 371 (5th Cir. 1955), we held that a Rule 15 motion made five days prior to trial was properly denied for inexcusable delay.² Appellant's motion came three weeks into trial, after the government had completed its case-in-chief. We hold that the trial court did not abuse its discretion when it denied Goldstein's Rule 15 motion because of unexcused delay.

[6-8] IV. Comments on appellant's failure to testify. The comments complained of are set forth in the margin.³ The Fifth Circuit test to determine if there has

²See also *United States v. Whiting*, 308 F.2d 537 (2d Cir. 1962) (holding that a Rule 15 motion filed on the first day of trial was properly denied for unexcusable delay); *United States v. Broker*, 246 F.2d 328 (2d Cir.), cert. denied, 355 U.S. 837, 78 S.Ct. 63, 2 L.Ed.2d 49 (1957) (holding that a motion filed on the eve of trial may be denied for unexcused delay).

³Did Goldstein say, hey, stop, no more sales? Did he say "Lets freeze the money, all money coming in and hold it for the benefit of the First Liberty Fund share holders?" No, he did not do that.

... Mr. Goldstein is trying to say that he is so naive ...

Now, what did Mr. Goldstein and the others do. Well, they didn't tell Reigler.

Mr. Goldstein met with Mr. Mattauch before the Frankfort meeting. He never told Mr. Mattauch about First Liberty being a fraud. They never told anyone, ladies and gentlemen.

There is no evidence in this case, one way or the other, as to who had the power to sign the checks on the NUSI account at the Swiss bank corporation, and there is no evidence in this case one way or another as to what happened to that money that was in that account.

been a comment on the failure of a defendant to testify is whether or not the statement was manifestly intended or was of such a character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. *United States v. White*, 444 F.2d 1274 (5th Cir.), cert. denied, 404 U.S. 949, 92 S.Ct. 300, 30 L.Ed.2d 266 (1971). A comment on the failure of the defense, as opposed to the defendant, to counter or explain the testimony presented or evidence introduced is not an infringement of the defendant's fifth amendment privilege. See *United States v. Hill*, 508 F.2d 345 (5th Cir. 1975). We conclude that all of the comments complained of here fall in the category of comments on the failure of the defense rather than comments on the failure of appellant Goldstein to testify.⁴ The court instructed the jury that it could not consider appellant's failure to testify, and we find no prejudice to appellant requiring reversal of his conviction.

Appellant Goldstein's additional complaint that the government violated one of the stipulations of fact in its closing argument is without merit, and the conviction as to him is **AFFIRMED**.

⁴For a comparison of another argument held not to violate a defendant's fifth amendment privilege, see *United States v. Wilson*, 500 F.2d 715, 721 (5th Cir. 1974).

App. 10

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3362

D. C. Docket No. FL-74-69-CR-CF
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

MILES DEARDEN, JR., ALEX GOLDSTEIN
and LEONARD NIKOLORIC,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Florida

Before GEWIN, GEE and FAY, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of
the record from the United States District Court for the
Southern District of Florida, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here
ordered and adjudged by this Court that the judgment of
the said District Court in this cause be, and the same is
hereby, affirmed.

FEBRUARY 3, 1977

ISSUED AS MANDATE: MAR. 25, 1977
(AS TO MILES DEARDEN, JR. and
ALEX GOLDSTEIN ONLY)

App. 11

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH Tel. 504-589-6514
Clerk 600 Camp Street
New Orleans, LA 70130

March 17, 1977

TO ALL PARTIES LISTED BELOW:

No. 75-3362 - USA v. Miles Dearden, Jr., Alex
Goldstein and Leonard Nikoloric

Dear Counsel:

This is to advise that an order has this day been en-
tered denying the petition for rehearing,* and no
member of the panel nor Judge in regular active service
on the Court having requested that the Court be polled on
rehearing en banc (Rule 35, Federal Rules of Appellate
Procedure; Local Fifth Circuit Rule 12) the petition for
rehearing en banc* has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for
issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By SUSAN M. G??????

/smg

cc: Mr. Theodore Klein
Mr. Ronald I. Strauss
Mr. Arnold R. Ginsberg
Mr. Barry L. Garber
Mr. Robert L. Guthrie
Mr. Robert W. Rust
Mr. Morris Silverstein

*on behalf of Nikoloric

APPENDIX C

CHAPTER 19—CONSPIRACY

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

APPENDIX D

CHAPTER 63—MAIL FRAUD

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or anything whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

As amended May 24, 1949, c. 139, § 34, 63 Stat. 94; Aug. 12, 1970, Pub.L. 91-375, § 6(j) (11), 84 Stat. 778.

APPENDIX E

Rule 15.

DEPOSITIONS

(a) **When Taken.** Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

in the
Supreme Court
of the
United States

OCTOBER TERM 1976

CASE NO. 76-1440

ALEX GOLDSTEIN,

Petitioner,

vs.

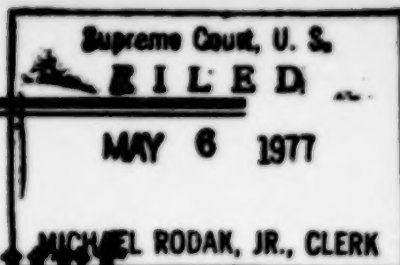
UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX

RONALD I. STRAUSS, ESQUIRE
Highsmith, Strauss & Varner, P.A.
Suite 17 — Tower Three
825 South Bayshore Drive
Miami, Florida 33131
Telephone: (305) 358-6600

Attorneys for Petitioner



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Pertinent portion of proceedings App. 1-3

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APPENDIX H—

Court Order dated June 20, 1975; Portion
of the Clerk's Criminal Docket
Proceedings App. 7-8

APPENDIX I—

Court Order dated July 10, 1975 App. 9-10

APPENDIX J—

Petitioner's responding letter dated July 14,
1975, concerning availability of witness
and proximity of Bahamas for taking of
depositions App. 11-14

APPENDIX K—

Docket Entries App. 15-17

APPENDIX F

(Thereupon, the following proceedings were had out of the presence of the jury:)

THE COURT: Good morning, gentlemen.

Counsel, do you have a matter to present this morning to the Court?

MR. ULLMAN: Your Honor, before we recessed on Thursday, you had instructed Mr. Arrington to return to the Court and he is here now with the report.

While Mr. Arrington is coming in—

THE COURT: Well, you can tell me what the problem is without him being present.

MR. ULLMAN: No problem, Your Honor.

THE COURT: All right.

I have a motion that has just been handed me by my clerk and signed by Mr. Strauss, wherein he has asked the Court for an order recessing the trial to permit the defendant Goldstein to secure depositions from the Rieble Brothers over in Germany.

MR. STRAUSS: Your Honor, may I suggest that it was for the Bahamas or that they would come to the trial and testify, if they were sure that they would not be arrested at that time and this assurance I could not give them.

THE COURT: Did you talk to them while you were in Germany?

MR. STRAUSS: Yes, sir, I did.

THE COURT: Your motion is denied.

MR. STRAUSS: May I make a proffer?

THE COURT: No, sir, I don't want to hear one word about it.

You have had a full-blown, gift-edge, fourteen karat opportunity to talk to these people and to accomplish your purpose, gather the information that you required, and then to line up your witnesses, and for you at this late date to come in here with something like this when you knew very well all this evidence that existed up to this point would be forthcoming—no one with any intimate knowledge of this case could possibly avoid knowing the situation that we have today insofar as the state of the evidence that would exist.

MR. STRAUSS: Your Honor, they were willing to come to the Bahamas to give the deposition on a Saturday, which would not interrupt this Court.

My suggestion to the Court is the motion that these witnesses refuse to give any kind of testimony in Germany, and it is only by intensive phone calls to them and requesting their assistance—this was because of the many matters which have been brought to the Court which are inaccurate.

THE COURT: What is the position of the Government?

MR. ULLMAN: Your Honor, we oppose it.

THE COURT: And the position of other defense counsel?

MR. KLEIN: No position.

MR. PEARSON: No position.

THE COURT: Denied.

You were given an opportunity to secure depositions. You were right there in Germany and you talked to these people.

MR. STRAUSS: At which time they refused, sir.

THE COURT: If they refused, then I have no confidence that they will change their minds now.

They are indicted defendants in this case, and they are alleged to be co-conspirators and guilty of substantive counts.

You talked to them and you were sent there for that purpose, and to come in now with this sort of belated thing is not proper.

Today is the 8th—it's denied.

If I have any discretion with respect to a matter of this kind, I have exercised it negatively and I hope properly.

APPENDIX G

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

CASE NO. FL-74-69-CR-CF

**UNITED STATES OF AMERICA,
vs.**

**LEONARD NIKOLORIC, et al.,
Defendants.**

**MOTION TO RECESS TRIAL AND OBTAIN
DEPOSITIONS OF THE DEFENDANTS,
JURGEN REIBLE AND VOLKER REIBLE
IN THE BAHAMAS**

COMES NOW the Defendant, ALEX GOLDSTEIN, by and through his undersigned counsel, and moves this Honorable Court to grant leave to Defendant Goldstein to recess the above captioned trial, currently in progress, to obtain the depositions(s) of JURGEN REIBLE and/or VOLKER REIBLE, defendants herein, and as grounds therefore sets forth as follows:

1. As a result of the intense effort of the undersigned counsel, correspondence was received from the co-defendant, VOLKER REIBLE, same being attached hereto and incorporated by reference herein, as Exhibit "A", wherein said statement reflects that the Reible brothers will attend depositions in the United States in the event they are not arrested, or in the alternative in the Bahamas, so that all matters may be presented to this jury.

2. That numerous telexes, conversations, and the transfer of monies were handled only by the Reible brothers and, therefore, their testimony pertaining to such matters are extremely material and relevant to the issues now pending before this Court.

3. That no prejudice can attach in that the Reible brothers are classified as "co-defendants" and all parties are aware of the evidence said deponents will elicit.

4. That in the interest of justice and to guarantee a fair and impartial trial to the Defendant, Goldstein, pursuant to the provisions of the Sixth Amendment to the United States Constitution, it is respectfully requested that this Honorable Court grant leave to obtain said depositions in the Bahamas on a date certain prior to submitting the pending issues to this jury.

I HEREBY CERTIFY that a true copy of the foregoing Motion for Leave to Take Depositions was hand delivered to all counsel of record in open Court this 8 day of July, 1975.

Respectfully submitted,

HIGHSMITH, STRAUSS &
NELSON, P.A.

Attorneys for Defendant Goldstein
Suite 17-3, Tower Three
825 South Bayshore Drive
Miami, Florida 33125
Telephone: 358-6600

By: /s/ Ronald I. Strauss

RONALD I. STRAUSS

cc: Barry Garber, Esq.
Daniel Pearson, Esq.
Theodore Klein, Esq.
Jerome B. Ullman, Esq.

APPENDIX H

[TITLE OMITTED]

ORDER

(Filed June 20, 1975)

In reviewing the Court file in preparation for the Pretrial Conference on June 23, 1975, the Court has observed several motions upon which Orders have not been entered including a motion to suppress grand jury testimony and a motion to attend the taking of depositions in Germany, both of which were filed by the defendant Miles Dearden, Jr., through his counsel Theodore Klein, Esq.

The motion for suppression of grand jury testimony was filed February 3, 1975. This motion was set for hearing on May 19, 1975, along with a Pretrial Conference which was likewise calendared for that date. At said hearing and conference, Mr. Klein was not present, but the defendant Dearden, Jr., was represented by Erwin Block, Esq. Counsel for the government announced that the government did not intend to use the testimony of Dearden, Jr. before the grand jury at the trial except to the extent that it may be used for the purpose of impeachment. Today Mr. Klein has announced to counsel for the government that he is withdrawing the said motion.

Regarding defendant Dearden, Jr.'s motion for an Order authorizing his attendance of the depositions in Germany, the Court was advised that that motion has likewise been withdrawn and requires no ruling.

Both of said motions having been withdrawn by the movant, no Order is required from the Court.

DONE and ORDERED at West Palm Beach, Florida this 20th day of June, 1975.

By: /s/ Charles B. Fulton

Chief Judge

cc: U.S. Attorney
Barry Garber, Esq.
Dan Pearson, Esq.
Theodore Klein, Esq.
John Fisher, Esq.
Ronald Strauss, Esq.

CASE NO. 74-69-CR-CF

CRIMINAL DOCKET PROCEEDINGS

July 10	GOLDSTEIN: Proffer with reference to Depositions of Reible Brothers. (Before CF 7/09/75).	115
10	GOVT.: Response to Deft. Goldstein's Motion to Recess Trial and Obtain Depositions	116
10	ORDER: After more than two weeks of trial and at a time when the govt. was concluding its case in chief, counsel for Goldstein moved the Court to recess the trial so that he may take the deposition of the Reible Brothers somewhere in the Bahama Islands. Every possible consideration and advantage for gathering evidence and preparing for trial has heretofore been accorded Goldstein and counsel by both counsel for govt. and the Court. For the reasons stated, this motion is DENIED. (7/10/75-CB). MR-141.	117

APPENDIX I

[TITLE OMITTED]

ORDER

(Filed July 10, 1977)

Prior to trial government counsel in this case literally opened the government's file. Volumes of documentary evidence have been revealed and inspected and copied.

Counsel for defendant Goldstein was authorized and permitted to take depositions of witnesses in Germany, and elsewhere in Europe. This request was not opposed by government counsel but received government cooperation. Goldstein's counsel was literally given the run of Germany and Switzerland to search for and depose witnesses.

It appears that on one occasion counsel for Goldstein indicated a desire to view certain documents and possibly depose witnesses at a certain place but did not appear, although counsel for the government was there and waited for several hours.

Although Goldstein's counsel desired to secure certain Swiss bank records, these were unavailable because of International Treaties, or the lack of them. There was no opposition from the government in this effort, it appearing that the government desired and could use the same records.

While in Germany counsel for Goldstein conferred with the Reible Brothers, with whom the defendant Goldstein was acquainted. The Reible Brothers are former business associates of the defendant Goldstein. Obviously, the Reible Brothers either were not requested to depose or declined to do so. They are charged as defendants in many of the counts of this indictment, but are beyond the jurisdiction of the Court and the reach of the government, extradition having apparently failed.

After more than two weeks of trial and at a time when the government was concluding its case in chief, counsel for Goldstein moved the Court to recess the trial so that he may take the deposition of the Reible Brothers somewhere in the Bahama Islands.

Every possible consideration and advantage for gathering evidence and preparing for trial has heretofore been accorded Goldstein and his counsel by both counsel for the government and the Court.

For the reasons stated, this motion is denied.

DONE and ORDERED at Miami, Florida, this 10 day of July, 1975.

By: /s/ Charles B. Fulton

Chief Judge

cc: All counsel.

APPENDIX J

LAW OFFICES
HIGHSMITH, STRAUSS & NELSON
PROFESSIONAL ASSOCIATION
17TH FLOOR — TOWER THREE
825 SOUTH BAYSHORE DRIVE
MIAMI, FLORIDA 33131

July 14, 1975

Honorable Charles B. Fulton,
Chief Judge, United States District Court
Southern District of Florida
P. O. Box 01590
Miami, Florida 33101

Re: United States v. Nikoloric, et al.,
Case No: FL-74-69-Cr-CF
Order dated July 10, 1975

Dear Judge Fulton:

The above described Order was received by the undersigned during the trial of this cause on July 10, 1975.

I believe it is incumbent on me to clarify paragraph three of the first page of that Order. At no time, did I ever not attend a deposition of witnesses in Germany by prearrangement or otherwise. I attended all depositions, which were scheduled, and which were discussed.

With reference to reviewing certain documents, the undersigned advised the two Assistant United States at-

torneys, during the deposition of Mr. Mattauch, that there existed a "FLF clearing account" which did not have a bank number, and said account was handled by Bank Widermann of Switzerland. That the Government was unaware of the existence of the account, and the documents pertaining thereto. I further advised the assistant United States attorneys, that the German prosecutor's office in Mannheim, had the complete records of Bank Widermann, and there the Government would find the records that I had described, and said records would establish that an excess of \$146,000.00 were returned to German investors by agreement of NUSI GMBH (Baden-Baden) and Bank Widermann, after it was discovered that there was no longer insurance possibilities for the First Liberty Fund investors. At that time, I had already in my possession the clearing account records, but in order to verify and to establish authenticity, it was suggested that the Government personally review the documents which were in possession of the German prosecutor, who had purportedly obtained same from the Courts in Switzerland. The following day, I was advised by Mr. Ullman that they had indeed discovered the records and asked if I would desire to review the records with them at the prosecutor's office, and indeed had made the arrangements for my review. After consultation with my client, Alex Goldstein, I returned the call to the German prosecutor's office in Mannheim, and advised Mr. Ullman that I had complete records in my possession, and requested that they either obtain the copies of said records for use in the United States, or in the alternative I would present copies of the records at my expense when I returned to the United States.

That, in fact, subsequent to my return to the United States, I transmitted two letters, the first of which the Government advised they had not received, which attached copies of the Bank Widermann clearing account records for the Government's perusal. That further, the undersigned did request and obtain an interview with the Raible brothers while I was in Germany to attend the depositions, and at such time, I requested and had the attendance of the court appointed court reporter, Richard Gurian, in the event the Reible brothers would wish to give me a sworn statement. Furthermore, in attendance at the meeting was the approved translator. Although the court reporter and translator sat through the entire meeting between myself and the Reible brothers, there was not a willingness on behalf of the Reible brothers to transcribe our conversations, sworn or unsworn.

Furthermore, the Order of July 10, 1975 sets forth that "extradition having apparently failed", which, to my understanding, is not in accord with the procedures utilized by the United States Government. It is my understanding, that extradition was never attempted and that further, the United States Government did not comply with German law by translating the Indictment into German, but merely mailed a copy to the Reible brothers. I have been advised that the Government has correspondence from the Reible brothers pertaining thereto. It is my further understanding that there is no Court order denying extradition from any German court, nor any attempt made through the United States Embassy or Consulate to extradite the Reible brothers.

It is suggested that if the Court desires further elaboration or clarification of the above, that an evidentiary hearing be scheduled so that the matters set forth hereinabove may be made formally part of this record. In the alternative, it is requested that this correspondence be filed as part of the record in this cause.

Very truly yours,

RONALD I. STRAUSS

By: /s/ Ronald I. Strauss

RIS:mn

cc: Jerome B. Ullman, Esq.;
Theodore Klein, Esq.;
Barry Garber, Esq.;
Daniel Pearson, Esq.

APPENDIX K

DOCKET ENTRIES

Date	Proceedings	Pages
1975		
June 23	NIKOLORIC; DEARDEN, JR.; DEARDEN, SR.; HAMILTON AND GOLDSTEIN: ORDER FOR DISMISSAL (Cont'd). the US Attorney for the Southern Dist. of Florida, hereby DISMISSES the Counts, 2, 5, 6, 11, 12, 15, 19, 20, 22, 40 and 42 against the named Defts. LEAVE OF COURT IS GRANTED. (6/23/75-CF). MR-141.	111
July 10	GOVT.: Memorandum on Conspiracy.	112
10	GOVT.: Memorandum of Law on the Admissibility of One Co-Conspirator's Acts and Declarations Against the Other Co-Conspirators.	113
10	GOVT.: Memorandum on Mail Fraud.	114
10	GOLDSTEIN: Proffer with reference to Depositions of Reible Brothers. (Before CF 7/09/75).	115
10	GOVT.: Response to Deft. Goldstein's Motion to Recess Trial and Obtain Depositions	116
10	ORDER: After more than two weeks of trial and at a time when the govt. was concluding its case in chief, counsel for Goldstein moved the Court to recess the trial so that he may take the deposition of the Reible Brothers somewhere in the	

DOCKET ENTRIES (cont.)

Date	Proceedings	Pages
	Bahama Islands. Every possible consideration and advantage for gathering evidence and preparing for trial has heretofore been accorded Goldstein and counsel by both counsel for govt. and the Court. For the reasons stated, this motion is DENIED. (7/10/75). MR-141.	117
July 24	Following pleadings received in Clerk's office on 7/24/75.	
June 23	DEARDEN, SR.: Motion to suppress and memo. of law.	118
23	GOLDSTEIN: Issue presented.	119
23	GOLDSTEIN: Memo. of law in response to govt. intention to introduce bank records at time of trial.	120
23	ALL DEFTS. & GOVT.: Stipulations Defts. waive all objections to authenticity & chain of custody of the following documents now in govt. file. See pleading for details.	121
23	DEARDEN, SR.: Stipulation. Deft. waives all objections to authenticity & chain of custody of the following documents now in the govt. file. See pleading for details.	122
23	GOVT.: Letter to Ronald I. Strauss, Esq., govt. is prepared to waive approximately 41 objections made during the depositions.	123

DOCKET ENTRIES (cont.)

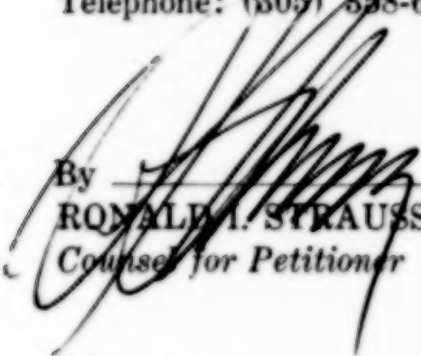
Date	Proceedings	Pages
23	NIKOLORIC: Stipulation Re Stock Ownership.	124
23	GOLDSTEIN: Rule 10 G — certificate of good faith, Rule 2, Certificate of service.	125
23	GOLDSTEIN: Motion to compel production pursuant to "standing discovery order" and Brady v. Maryland. Presented and argued at pre-trial. DENIED. (6/23/75-CF) R141.	126
June 24	NIKOLORIC, DEARDEN, JR., DEARDEN, SR., HAMILTON, & GOLDSTEIN: Transcript of pretrial conference taken 2/7/75.	127

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the within Supplemental Appendix to the United States Court of Appeals for the Fifth Circuit was mailed this ~~4th~~ day of ~~April~~^{MAY}, 1977 to the office of the Solicitor General, Department of Justice, Room 5614, Washington, D.C., 20530.

HIGHSMITH, STRAUSS &
VARNER, P.A.

Suite 17 — Tower Three
825 South Bayshore Drive
Miami, Florida 33131
Telephone: (305) 858-6600

By 
RONALD I. STRAUSS
Counsel for Petitioner

in the
Supreme Court
of the
United States

OCTOBER TERM 1976

CASE NO. 76-1440

ALEX GOLDSTEIN,

Petitioner,

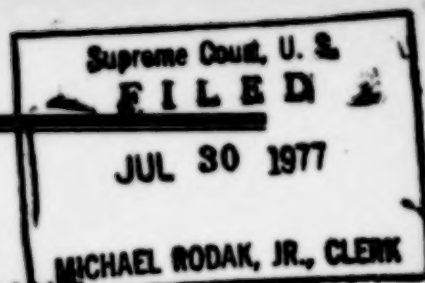
vs.

UNITED STATES OF AMERICA,

Respondent.

SECOND SUPPLEMENTAL APPENDIX

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Suite 17—Tower Three
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Telephone: (305) 358-6600
Attorneys for Petitioner



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SECOND SUPPLEMENTAL APPENDIX**

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APPENDIX L

May 19, 1975, colloquy of Government
counsel with Trial Court and defense relating
to probable dismissal of indictment against
the Reible brothers."App. 1-4

COURT REPORTER'S CERTIFICATEApp. 5

CERTIFICATE OF SERVICEApp. 6

**United States District Court
Southern District of Florida**

CASE NO. 74-69-CR-CF

UNITED STATES OF AMERICA,

vs.

**LEONARD NIKOLORIC, MILES DEARDEN, JR.,
MILES DEARDEN, SR., MERTON HAMILTON,
and ALEX GOLDSTIN,**

Defendants.

**PARTIAL TRANSCRIPT OF PROCEEDINGS
HAD BEFORE THE COURT**

U.S. Attorney: JEROME ULLMAN, ESQ.

Defendants' Attorneys: BARRY GARBER, ESQ.
(For Deft. Nikoloric
and Hamilton)

DAN PEARSON, ESQ.
(For Deft. Miles
Dearden, Sr.)

IRWIN BLOCK, ESQ.
(For Deft. Miles
Dearden, Jr.)

RONALD STRAUSS, ESQ.
(For Deft. Goldstein)

Also Present: MARK RICHARD and
ROGER FORTUNA
(Department of Justice)

NICK BUONICONTE, ESQ.

Monday, May 19, 1975
U.S. District Courthouse
West Palm Beach, Florida

PROCEEDINGS

* * *

MR. STRAUSS: Your Honor, in this regard, there are two defendants listed on the indictment, the Wreble [sic] brothers, who have not been extradited from Germany, and I wonder if the Court would comment as to its views pertaining to presentation of evidence revolving solely around the Wreble [sic] brothers and not as to the defendants since they are not here.

THE COURT: I don't know how you want me to comment. What do you want me to speak to?

MR. STRAUSS: Your Honor, it's my feeling that the Government will try to lump their evidence of proof against the [sic] Wreble brothers and make an indication that Goldstein was part of the German group, and there are things we cannot respond to solely within the province of the Wreble [sic] brothers.

When it comes to that point we are going to have some difficulty, I believe, in the objections of delaying the trial unless we get an overall view pertaining to the Court's opinion of absent defendants and how it should be directed.

THE COURT: It's not unusual that co-conspirators are not indicted, and the fact that they are absent is sort of a similar situation. And when you proceed with the trial with the burden of proof being upon the Government to prove beyond a reasonable doubt, first, that there was conspiracy and membership in it and these other things and if that kind of proof is made and these people are absent, they can't be made a subject of conviction or a sentence.

But they were members and other people were members and whatever they said or did will be part of the evidentiary portion of the case I would think.

I don't know how to rule any differently than that.

THE COURT: Do you need to retain these two defendants who were not served who are not before the Court?

MR. ULLMAN: We intend to offer some evidence about them and they need to be referred to as co-conspirators. We don't think that we're going to be able to extradite them.

THE COURT: Are they Germans?

MR. ULLMAN: Yes. At some point I would anticipate that we would probably just dismiss the indictment against them because they would not be extraditable, and we anticipate that they may well be indicted in Germany with further causes.

* * *

THE STATE OF FLORIDA,)
COUNTY OF PALM BEACH,)

I, Peggy Goodendorf, Court Reporter, do hereby certify that I was authorized to and did report the above hearing at the time and place herein stated and that this is a true and correct partial transcription of my stenotype notes taken at said hearing.

In witness whereof, I have hereunto set my hand this 5th day of July, 1977.

PEGGY GOODENDORF
Court Reporter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the within Second Supplemental Appendix to the United States Supreme Court was mailed this 29th day of July, 1977 to the office of the Solicitor General, Department of Justice, Room 5614, Washington, D.C., 20530.

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Counsel for Petitioner

Nos. 76-1440, 76-6561 and 76-6579 21 1977



In the Supreme Court of the United States

OCTOBER TERM, 1977

ALEX GOLDSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

LEONARD NIKOLORIC, PETITIONER

v.

UNITED STATES OF AMERICA

MILES DEARDEN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,

Solicitor General,

BENJAMIN R. CIVILETTI,

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1440

ALEX GOLDSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 76-6561

LEONARD NIKOLORIC, PETITIONER

v.

UNITED STATES OF AMERICA

No. 76-6579

MILES DEARDEN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 546 F. 2d 622.¹

¹ "Pet. App." refers to the appendix in No. 76-6561.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1977. Petitions for rehearing and rehearing *en banc* were denied on March 17, 1977. The petitions for writs of certiorari were filed on April 14, 1977 (No. 76-6561), April 16, 1977 (No. 76-1440), and April 18, 1977 (No. 76-6579). No. 76-6579 is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence of other fraudulent activities by some of the conspirators in this case was relevant to prove the conspiracy charged, and whether petitioner Nikoloric was prejudiced by any error.

2. Whether petitioner Nikoloric's status as trustee of fraudulently obtained funds immunized him from criminal prosecution for transactions involving the transfer of those funds.

3. Whether the trial court abused its discretion in denying petitioner Goldstein's mid-trial motion to depose foreign witnesses.

4. Whether the prosecutor improperly commented on petitioner Goldstein's failure to testify.

5. Whether petitioner Dearden was improperly denied prior to trial copies of the voluminous documentary evidence he requested at the government's expense.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of conspiracy to transport money obtained by fraud, in violation of 18 U.S.C. 371. Petitioners Nikoloric and Dearden were also convicted on seven and twelve counts of mail fraud, wire fraud, and interstate or foreign transportation of monies or securities converted or taken by fraud, in violation of 18 U.S.C. 1341, 1343, 2314 and 2. Petitioner Goldstein was sentenced to two years' imprisonment. Petitioners Nikoloric and Dearden were sentenced to concurrent terms of five years' imprisonment on the conspiracy count and two years' imprisonment on each of the substantive offenses.² The court of appeals affirmed.

The evidence showed that petitioners and others established a scheme to defraud investors in the First Liberty Fund, an offshore mutual fund, through the sale of worthless securities. Petitioner Dearden was a managing partner of the fund. Petitioner Nikoloric, who entered the scheme after its creation, assisted in the operation and management of First Liberty, and petitioner Goldstein was a partner in the sales organization that sold First Liberty securities. (Pet. App. 1329).

1. First Liberty Fund was formed in the Bahamas in late 1968 by Phillip Wilson, Jack Axelrod, Sam

² Miles Dearden, Sr., also was convicted on several counts. He did not appeal (Pet. App. 1329 n. 1).

Wilkenson, and others (Tr. 71).³ Axelrod prepared and Wilkenson (who was not a certified public accountant) certified balance sheets reflecting that First Liberty's assets exceeded \$26 million in January 1970 (G. Exh. 76) and \$32 million in March 1970 (G. Exh. 80; Tr. 173). These figures were baseless. First Liberty's assets were all but valueless (Tr. 81, 172). In April 1970 petitioner Dearden became president and director of First Liberty (Tr. 93, 113).

To stimulate purchases of its shares, First Liberty entered into an agreement with Transcontinental Casualty Insurance Company ("Transcon") (Tr. 258-259) under which Transcon purportedly "guaranteed" all investments in First Liberty held for a period of three years. Transcon, however, had insufficient assets to underwrite these investments (Tr. 267).

In April 1970 Wilson learned that a European acquaintance, Jerry Lasky, had a sales force in Baden-Baden, West Germany, that was seeking a mutual fund to sell to its clients (Tr. 417). First Liberty and Lasky subsequently agreed that Lasky's sales organization, Northern U.S. Investors ("NUSI"), would sell First Liberty shares in Europe for a commission (Tr. 420-423). Petitioner Goldstein and co-conspira-

³ "Tr." refers to the 11-volume transcript of the evidence at trial. "Tr. Cl." refers to the one-volume transcript of the closing arguments of the prosecutor and petitioner Goldstein's counsel. "G. Exh." refers to the government's exhibits introduced at trial. "M. Supp. R." refers to the government's motion to supplement the record, contained in volume 18 of the record in this Court.

tors Jurgen and Volker Reible were partners in NUSI (Tr. 434, 1113-1114, 2517).⁴

Petitioner Nikoloric, an attorney, came in contact with First Liberty in Germany while seeking financing for Cocein, a financially distressed Honduran lumber company of which he was president. He entered into an agreement in June 1970 by which First Liberty sales proceeds would be used to finance Cocein (Tr. 2403-2410). In August 1970 Nikoloric reached an agreement with a partnership that included key principals of First Liberty; under this agreement Nikoloric was to receive a \$40,000 annual retainer, his expenses, and one-quarter of the venture's profits (Tr. 2130; G. Exh. 226C).

2. In late July 1970 petitioners, the Reible brothers, and officers of First Liberty met in Baden-Baden and discussed a plan for the sale of First Liberty shares to investors in a troubled mutual fund, Investors Overseas Service ("IOS"). The plan provided for a sales program by which IOS investors would redeem their IOS shares through a Zurich bank and purchase First Liberty shares instead, with the proceeds to be deposited in First Liberty's account at a Geneva bank (Tr. 500-501, 1121-1124, 1137).

After the July meeting, brokers were sent false financial statements of First Liberty and other false

⁴ It was agreed that NUSI would receive a 22½ percent sales commission, in addition to Lasky's personal 10 percent commission, for all sales of First Liberty shares (G. Exhs. 222, 223; Tr. 423-424). The customary commission on European sales of offshore mutual funds was 8½ percent, with the highest being no more than 10 percent (Tr. 430).

or misleading information, including (1) a statement reflecting a nonexistent \$1,697,000 profit by Cocein (G. Exh. 149J); (2) a balance sheet showing First Liberty's assets as exceeding \$31 million (G. Exh. 85); (3) a statement describing First Liberty's annual growth rate as 72½ percent (G. Exh. 87); and (4) a prospectus published by First Liberty showing a \$290 million net worth for Transcon, the insurance guarantor,⁵ and \$27 million in First Liberty assets (G. Exhs. 92, 231G). Investors relying upon this information purchased more than \$1.8 million worth of First Liberty shares in the period through mid-December 1970 (Tr. 600-601, 1110-1111, 1138-1140, 1177-1183, 1318-1319, 1324-1327, 1329-1333, 1409-1414, 1448-1450, 1473).

In September 1970, after the Geneva bank holding the sales proceeds of First Liberty shares had closed the company's account, petitioners, the Reible brothers, and others discussed means (including issuance of a revamped financial statement) of persuading another bank to accept the some \$600,000 in proceeds that had accumulated. At the same time Goldstein and the Reibles demanded a 40 percent commission for NUSI on future sales; petitioner Nikoloric and Richard Brandom, a First Liberty principal, acceded to the request (Tr. 575-578, 638-640, 1073-1074, 2554). When a Zurich bank accepted the First Liberty account, NUSI commissions amounting to \$170,000 of

⁵ Petitioner Nikoloric knew that Transcon had been unable to post a \$100,000 guarantee in the London financial market (Tr. 458-459).

the initial \$673,000 deposit were transferred to a numbered account, and petitioners implemented a plan to conceal the amount of future NUSI commissions from the bank (Tr. 617-623).⁶

Despite subsequent changes in the control of First Liberty, petitioner Nikoloric and NUSI continued to receive disbursements from the company as before (Tr. 681-684, 2221-2226, 2557-2558). Of more than \$1.8 million in sales proceeds of First Liberty shares, NUSI (in which petitioner Goldstein was a partner) received nearly \$700,000, petitioner Nikoloric received nearly \$40,000, and Cocein (of which Nikoloric was a principal shareholder) received \$220,000 (Tr. 2212, 2495-2496). With one minor exception, investors in First Liberty lost their money (Tr. 1198-1200, 1405-1406, 1416, 1457, 1469, 1474).

ARGUMENT

1. Petitioner Nikoloric contends (Pet. 10-22) that the proof at trial showed the existence of multiple conspiracies rather than the single one alleged in the indictment. Petitioner's argument was accurately characterized by the court of appeals (Pet. App. 1331-1332) as an objection to the evidence introduced at trial rather than as a contention that the proof showed multiple conspiracies.

Most of the evidence to which petitioner objects was relevant to the question whether petitioner Nikoloric

⁶ As part of that plan, a substantial portion of the proceeds was routed to accounts in the name of petitioner Nikoloric in Washington, D.C., banks, from which they were forwarded to the numbered Swiss account (Tr. 620-623).

took part in a conspiracy to defraud customers of First Liberty. The evidence showed either the fraudulent nature of that company or Nikoloric's knowledge of the fraud by the co-conspirators. Evidence was introduced, for example, to show fraudulent manipulation of the Bank of Sark by Axelrod and Philip Wilson. The Bank of Sark, however, was listed on some of First Liberty's financial statements as the holder of \$900,000 of its funds (G. Exh. 84, 92; Tr. 1943-1944). Evidence of the fact that the Bank of Sark was itself a fraud thus helped to demonstrate the nature of the deception engaged in by First Liberty.⁷ Moreover, petitioner Nikoloric had been made aware in July 1970 of the unreliability of the persons operating the Bank of Sark (Tr. 455-458), and evidence of its practices was thus relevant to Nikoloric's knowledge of the fraud practiced by First Liberty.⁸

⁷ At the time the Bank of Sark was represented to hold \$900,000 in First Liberty assets, it had actual deposits totaling about \$15,000 (Tr. 90). In similar fashion, holdings in Tangible Risk, Compreal Holding, Bethany Lodge, London and Wales, and Comutrix were listed as assets on First Liberty's balance sheets distributed in Europe, but they were either worthless or grossly overvalued in the statements (Tr. 86, 209, 247, 1580-1614; G. Exhs. 89, 92, 98).

⁸ In like manner, petitioner Nikoloric had been informed of the purchase of securities from another bank by petitioner Dearden at a greatly inflated price, in return for a bank account in which to deposit First Liberty sales proceeds (Tr. 670-674). Since these securities were then listed as a First Liberty asset (Tr. 673-674; G. Exh. 98), evidence of this transaction tended to show Nikoloric's knowledge of First Liberty's practice of inflating its assets. Dearden's action in purchasing the stock did not show the existence of a separate conspiracy; it was an act of a co-conspirator in fur-

The rest of the evidence that petitioner contends related to separate conspiracies involving institutions other than First Liberty (albeit involving some of the same conspirators) was elicited during defendants' cross-examination of government witnesses.⁹ Petitioner Nikoloric evidently did not believe during trial that this evidence was prejudicial to him, since he did not object to its admission.¹⁰ In any event, assuming that some of this evidence was inadmissible with regard to petitioner, we submit that he suffered no prejudice from it. Petitioner Nikoloric was no peripheral figure in the scheme to defraud investors in First Liberty; this was accordingly not a case "where a minor participant in one conspiracy was forced to sit through weeks of damaging evidence' relating to others." *United States v. Bernstein*, 533 F. 2d 775, 793 (C.A. 2), certiorari denied, 429 U.S. 998; *United States v. Miley*, 513 F. 2d 1191, 1209 (C.A. 2), certiorari denied *sub nom. Goldstein v. United States*,

therance of the conspiracy alleged. There was also evidence of other attempted or successful acquisitions of properties by Dearden, which were then listed as First Liberty assets, some at grossly inflated value (*e.g.*, Compreal Holding, Bethany Lodge) (Tr. 119-123, 1561-1614, 1852-1870; G. Exh. 3). These transactions too were admissible as acts of a co-conspirator in furtherance of the conspiracy.

⁹ *E.g.*, Frank Blosser was cross-examined about his connection with fraudulent schemes involving English and Israeli companies (Tr. 320-322), and Axelrod was questioned about his involvement in fraudulent activities for which he had pleaded guilty to criminal charges (Tr. 165-167, 189-190).

¹⁰ Of the some 70 instances cited by petitioner as allusions to separate conspiracies, the record shows that he objected to only two (Tr. 89, 2019).

423 U.S. 842. Moreover, the trial judge thoroughly instructed the jury both during and after the reception of evidence that it was to treat each defendant separately and to consider only the acts of the individual defendant in determining whether he was a member of the conspiracy charged (*e.g.*, Tr. 68-69, 419-420, 3469-3470, 3492-3493). In these circumstances petitioner may not belatedly contend that he was prejudiced by evidence of "multiple conspiracies."

2. Petitioner Nikoloric's substantive convictions for wire fraud were based upon transfers of funds to and from two bank accounts in his name in Washington, D.C., banks. More than \$900,000 in First Liberty sales proceeds had been deposited in these accounts. More than \$240,000 was transferred from the accounts to the account of M. C. Dearden Associates in Florida, and more than \$250,000 was transferred to a numbered Swiss bank account. Petitioner Nikoloric personally received \$38,500 from the accounts (Tr. 2216-2220).

Petitioner Nikoloric contends (Pet. 36-40) that he was a "trustee" of First Liberty's funds, that he transported the sales proceeds in that capacity according to the instructions of the settlors, and that he was therefore not criminally liable for his acts.¹¹ At bottom petitioner's claim is that, although he knew First Liberty had obtained the funds in question by

¹¹ One of petitioner Nikoloric's accounts named him as a trustee, and he identified the accounts at trial as trust accounts (Tr. 2461). According to petitioner, disbursements from the accounts were made upon instructions from the Reibles and petitioner Dearden (*ibid.*).

fraud, he owed a higher duty to the settlors than he did to the criminal law. But a trustee has no duty to violate the law. ALI, *Restatement of the Law of Trusts* § 166, pp. 410-415 (1935); Scott, *Trusts* 271 (1967).¹²

3. Petitioner Goldstein contends (Pet. 8-14) that the district court erred in denying his mid-trial motion to depose Jurgen and Volker Reible, who were named in the indictment as defendants. The Reibles were fugitives in West Germany at the time of trial.

Petitioner filed a motion in January 1975 to take the depositions of 29 potential witnesses (R. 185, 195). The motion was denied for failure to make the required showing of need (R. 281-282). By February 1975 the prosecutor's exhibit file had been opened to petitioner's counsel for inspection and copying (R. 190-191, 209, 284-285, 426). In April 1975 petitioner Goldstein filed a supplemental motion to depose (R. 294). The court allowed depositions of 25 potential

¹² Petitioner's reliance (Pet. 38-39) on *Woodward v. Metro Bank of Dallas*, 522 F. 2d 84 (C.A. 5), is unwarranted. In *Woodward* the court considered the issue whether the defendant bank and its employee could be secondarily liable to an accommodation endorser under the securities fraud prohibitions of 17 C.F.R. 240.10b-5; the court found insufficient evidence of fraudulent knowledge to permit liability (522 F. 2d at 97-100). Petitioner seeks to analogize the facts of this case to those of *Woodward*. But petitioner conceded that he knew by October 1970 that First Liberty was a fraud (Tr. 2463). All but one of the transactions charged in the substantive counts on which he was convicted occurred after that date, and the conspiracy charge encompassed that period. Although the evidence was sufficient to show petitioner's guilty knowledge well before that date (see pages 3-7, *supra*), petitioner's own admission of knowledge further distinguishes this case from *Woodward*.

witnesses, primarily in West Germany, although the court noted that petitioner had shown the necessity of deposing less than half that number (R. 378-379). Although he had not moved to depose them, petitioner's counsel interviewed the Reibles about the case while in West Germany (R. 418-419).¹³

Trial began on June 25, 1975. Petitioner Goldstein moved two weeks later to recess the trial and to depose Jurgen and Volker Reible (R. 552). Attached to this motion was a statement of Volker Reible that the brothers would be willing to testify by deposition in the Bahamas if assurances of free passage in the United States could not be given (R. 554-555). The court denied the motion, concluding that it was untimely (R. 426-427; Tr. 1814-1817).

The court of appeals correctly held that the denial of the mid-trial motion was not an abuse of discretion. Petitioner Goldstein had been afforded broad discovery and full opportunity to seek depositions of the Reibles prior to trial. In denying the motion the district court observed (R. 427):

Every possible consideration and advantage for gathering evidence and preparing for trial has heretofore been accorded Goldstein and his counsel by both counsel for the government and the Court.

Moreover, petitioner's counsel interviewed the Reibles when in West Germany. Petitioner and the Reibles were co-defendants and significant figures in the

¹³ According to petitioner's counsel, the prosecutor declined his suggestion to depose the Reibles, and the Reibles refused to give sworn or written statements (R. 418).

scheme alleged in the indictment. The significance of their testimony, if any, to petitioner Goldstein should have been apparent well in advance of trial. Petitioner's failure to move to depose the Reibles until the third week of trial amply justified the court's denial of the motion for undue delay. *United States v. Whiting*, 308 F. 2d 537, 541-542 (C.A. 2), certiorari denied, 372 U.S. 919; see *United States v. Leon*, 441 F. 2d 175, 178 (C.A. 5).

Petitioner maintains (Pet. 13) that the delay was excusable because he did not know the theory of the government's case until after its case-in-chief. The district court, however, observed (Tr. 1815):

[N]o one with any intimate knowledge of this case could possibly avoid knowing the situation that we have today insofar as the state of the evidence that would exist.

Petitioner's claim that the delay was excusable is thus groundless.¹⁴

4. Petitioner Goldstein contends (Pet. 14-16) that the prosecutor improperly commented on his failure to testify at trial.

During closing argument the prosecutor stated:

Did Goldstein say, "Hey, stop, no more sales?" Did he say "Let's freeze the money, all

¹⁴ Petitioner relies on *United States v. Bronston*, 321 F. Supp. 1269 (S.D. N.Y.). In *Bronston* the court granted a motion to depose foreign witnesses submitted more than three weeks prior to trial, although the court noted that the motion was dilatory (321 F. Supp. at 1273). But there is a world of difference between pre-trial motions and mid-trial motions; *Bronston* does not indicate that no motion to depose may be denied as untimely.

money coming in and hold it for the benefit of the First Liberty Fund shareholders?" No, he did not do that. [Tr. Cl. 22.]

* * * * *

Now, what did Mr. Goldstein and the others do. Well, they didn't tell Riegler. [Tr. Cl. 69.]

* * * * *

Mr. Goldstein met with Mr. Mattauch before the Frankfort meeting. He never told Mr. Mattauch about First Liberty being a fraud. [Tr. Cl. 69.]

* * * * *

They never told anyone [that First Liberty was a fraud], ladies and gentlemen. [Tr. Cl. 69.]

Those comments have nothing whatever to do with petitioner Goldstein's failure to testify. On the contrary, they relate only to evidence of his conduct during the course of the fraudulent scheme, and they were therefore proper. They relate to Goldstein's dealings with investors, not to his defense at trial.

The prosecutor further commented (Tr. Cl. 67): "Mr. Goldstein is trying to say that he is so naive * * *." The statement was a proper response to the evidence presented by petitioner Goldstein in an effort to show that he was unaware of the fraudulent nature of First Liberty (Tr. 3119-3120, 3210-3211). The comment did not allude to petitioner's failure to testify.

Finally, the prosecutor observed (Tr. Cl. 128):

There is no evidence in this case, one way or the other, as to who had the power to sign the checks on this NUSI account at the Swiss bank

corporation, and there is no evidence in this case one way or the other as to what happened to the money that was in that account.

During closing argument, petitioner Goldstein's counsel had argued that the Reible brothers had exclusive control of the numbered Swiss bank account to which certain First Liberty sales proceeds were transferred (Tr. Cl. 103).¹⁵ The prosecutor's remark was a direct and proper response to that argument. Moreover, as the court of appeals observed (Pet. App. 1331), the remark was in the nature of a comment on the failure of the defense; it did not ask the jury to draw any inference from petitioner's failure to testify.

5. Petitioner Dearden contends (Pet. 5-8) that he was entitled to receive prior to trial copies of the government's proposed documentary evidence at government expense.

Petitioner's counsel, Theodore Klein, was appointed more than seven months prior to the June 1975 trial. By mid-December 1974, Klein had received voluminous *Jencks* material and was advised that the documentary evidence was available for inspection (R. 181-182, 278-280, 488).¹⁶ On February 6, 1975, petitioner sought reimbursement of almost \$500 as expenses incurred in copying some 4500 pages of the material (R. 234-235, 458). That application was granted (R. 380).

¹⁵ Petitioner Nikoloric had testified that the Reibles told him that the Swiss account was theirs (Tr. 2487).

¹⁶ Throughout the pretrial period the prosecutor continuously provided updated *Jencks* material, proposed lists of exhibits, and tentative lists of documents to be offered by each witness (R. 209, 234-235, 249-250, 255-276, 284-289, 496, 582-600).

Petitioner also requested advance payment of the cost of copying the documentary evidence; Klein stated that it was needed for trial preparation (R. 234-240). Arrangements had been made for co-defendants to obtain copies of the material, and the estimated cost of copying the approximately 15,000 pages was between \$1,000 and \$1,500 (R. 235). A hearing was held the following day; Klein stated that he needed copies of the material regardless of its availability from other sources (R. 460-461). The district court stated that it had contacted the attorney for petitioner's father, co-defendant Miles Dearden, Sr., who had agreed to lend his copies of documents in blocks to Klein so that he could use it in his own office (R. 464). The court observed that funds for the kind of expenditure sought by petitioner were very limited (R. 462-464, 469). Approximately ten days later the prosecutor informed Klein by letter that he would make all reasonable efforts to allow him to study the materials. The prosecutor stated that Klein could come to his office as often and as long as necessary for that purpose, and that a private area would be provided in which Klein could go over the materials with his client (M. Supp. R. Exh. A).

In April 1975 the court, responding to Klein's subsequent motion to have the material copied, requested reasons why the arrangement to obtain copies of the materials from co-defendant's counsel was unsatisfactory. The court also stated (M. Supp. R. Exh. B):

If adequate representation of your client demands that you receive copies of all this ma-

terial, will you please advise by whom the copies will be made, the mode of copying * * *; and if this additional expense must be incurred, please make every reasonable effort to obtain it as economically as possible.

The court asked for a more definite statement of cost and concluded by offering to enter an appropriate order upon further report for counsel (*ibid.*). A few days later the prosecutor noted in a letter to Klein that they were to meet to review the materials and determine what Klein wanted copied (M. Supp. R. Exh. C). Klein took no further action, either with regard to the district court's request and offer to authorize the expenses or with regard to the prosecutor's offer to provide assistance when more specifically advised of the particular documents Klein sought to copy.

Under these circumstances, petitioner was not penalized by his inability to afford copying costs. Although the documentary evidence was voluminous, petitioner's counsel was afforded access to it both in his own office and at the United States Attorney's office with provision for private consultation there with his client. Moreover, petitioner did nothing after the court offered to authorize the requested expenditure. Finally, petitioner's counsel effectively utilized the documentary evidence at trial (*E.g.*, Tr. 827-829, 1206-1208, 1615, 1879, 1883, 2039, 2473, 2475-2479). Accordingly, petitioner's claim that he was denied materials necessary for trial preparation is insubstantial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1977.

in the
Supreme Court
of the
United States

OCTOBER TERM, 1976

CASE NO. 76-1440

ALEX GOLDSTEIN,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the trial court erred to the substantial prejudice of the Petitioner and denied him due process and equal protection of the law and the right to compulsory

process over witnesses when in a conspiracy and a 41 count mail fraud prosecution it denied Petitioner's trial motion to depose two crucial defense witnesses whose testimony was demonstrably material to rebutting the conspiracy alleged against the Petitioner, and the conspiracy was the only charge of which the Petitioner was convicted?

2. Whether the trial court erred to the substantial prejudice of the Petitioner and denied him due process of law and a fair trial when it permitted the government to argue and comment in summation, over objection, that the defendant failed to testify which, when considered *in tandem* with the trial court's refusal to allow the trial depositions of the two defense witnesses pertinent to the conspiracy allegation, compounded Petitioner's disability to rebut the conspiracy charge or present an effective defense?

REPLY ARGUMENT

Certain over-selectivity in quoting portions of the trial proceedings below, the mislabeling of the Reible brothers as "fugitives" when in law and fact they were not, together with the government's ignoring the constitutional aspects of the two questions herein presented by the Petitioner, Goldstein, render essential the filing of this Reply Brief pursuant to Rule 24(4), Rules of the *United States Supreme Court*.

A. THE PETITIONER'S FIRST QUESTION PRESENTED.

1. The Fugitive Concept.

The often-seen prosecutorial comments to the contrary notwithstanding the brothers Reible were not and are not "fugitives," rendering the more vulnerable the government's opposition to their depositions. A "fugitive" is defined in Black's Law Dictionary, 4th Edition (1951) as:

"One who flees; always used in law with the implication of a flight, evasion or escape from some duty or penalty or from the consequences of a misdeed."

The term "fugitive from justice" at *Id.*, at page 800, is further defined:

"A person who, having committed a crime, flees from jurisdiction of Court where crime was committed or departs from his usual place of abode and conceals himself within the district. (citations omitted)"

The foregoing definition contains the following footnote:

"To be regarded as a 'fugitive from justice,' it is not necessary that one shall have left the state, for the very purpose of avoiding prosecution; it being sufficient that, having committed there an act constituting a crime, he afterwards has departed from its jurisdiction, and when sought to be prosecuted is found in another state. (citations omitted)

No matter for what purpose or with what motive for under what belief, he leaves the state, and even though at time of leaving he had no belief he had violated criminal laws and did not contemplate fleeing from justice to avoid prosecution for crime with which he is charged. (citation omitted)"

No interpretation of the incontrovertible facts at bar, however attenuated, justifies labeling the brothers Reible as fugitives. The brothers singularly or jointly, did not depart from the jurisdiction of the United States, the government's case amply demonstrated that whatever the Reible brothers did, inculpatory or otherwise, was effected in Europe. (See Tr.—Generally.) The government, moreover, conceded in its *Response to Defendant's Goldstein Motion to Recess Trial and Obtain Depositions*, that the Brothers were "German Nationals . . . who could not have arrest warrants served on them due to the lack of this Court's jurisdiction Germany where they reside." The government, therefore, (a) knew where the brothers resided, (b) knew that they did not secrete themselves, (c) even had received correspondence from the Reible brothers requesting a copy of the indictment, and (d) indicated that they would be dismissing the Reibles as defendants in the indictment. (See *2d Supp. Appendix, App.3.*)

But more important were the Petitioner's motion to depose the brothers, the government's opposition thereto and the trial and appellate courts' prevention of those depositions and its corresponding effect on the Petitioner's presenting all evidence "otherwise available" to him relative to the one remaining count of an original forty-two (42) indictment.

2. The Petitioner's Trial [Rule 15(a)] Motion To Depose The Brothers Reible

The government's Brief in Opposition, page 12, seriously misstates the facts when it labels the Petitioner's Trial Motion to Depose the Reible brothers as a motion to recess the trial. The motion (R. 418-422) clearly expressed Petitioner's need for the specialized exculpatory testimony of the brothers, their willingness and availability to be deposed in the Bahamas and suggested that "the deposition can take place on Saturday or Sunday of this forthcoming week and thereupon, not unduly delay the trial of this cause." The motion further "suggested" that an expedited transcript can be made available for reading to the jury on Monday. (See also, App.F., Supp.App.2-3)

The qualities of the motion vis-a-vis interrupting the trial proceedings, therefore, could not logically or intelligently be described as disruptive or burdensome. The normal weekend interruption of the trial proceedings also would have witnessed the satisfaction of the Petitioner's exculpatory evidentiary requirements.

Secondly, the government contributed to the delay in seeking the brothers' deposition, a further example of the unilateral, manipulative capacity of the prosecution which deprived the Petitioner from effectively marshalling and

presenting their exculpatory testimony in his defense. Prior to trial, the government announced that it was considering "dismissing" the Reibles from the indictment. (2d.Supp.Appendix,App.4) No further action was effected but at the commencement of trial, the brothers remained charged defendants, thus disabling the Petitioner from calling them as defense witnesses. When the trial's evidence unfolded focusing the government's attention to the Petitioner's alleged stock ownership in NUSI, and his alleged but unfounded control of the NUSI bank account, the importance of the Reibles' testimony contradicting such crystalized. Either one or both of the foregoing factors were unanswered by the government's Brief in Opposition.

3. The Constitutional Objections Unanswered.

Also unanswered in the Brief in Opposition are the strenuously urged constitutional objections made by the Petitioner: The automatic exclusion of willing but unavailable co-indictees from Rule 15, *supra* depositions contravening the Sixth Amendment's right to compulsory process over witnesses and unreasonable distinguishing between co-indictees who submit to prosecution and offer exculpatory testimony in behalf of a co-defendant. See *Byrd v. Wainwright*, *United States v. Echeles*, and *United States v. Shuford*, all *op.cit.* Petitioner's original petition.

B. THE PETITIONER'S SECOND QUESTION PRESENTED

1. The posture of the Record.

The government's characterization of the irrefutable posture of the trial proceedings is incorrect and ignores the very portion of the prosecutor's summation which

specifically and personally articulates the Petitioner by name when commenting on his failure to testify or explain the evidentiary deficiencies in his case. Omitted from the Brief of Opposition is the following:

"Did Goldstein say, Hey, stop, no more sales? Did he say, 'Let's freeze the money, all money coming in and hold it for the benefit of the First Liberty Fund shareholders?' No, he did not do that. (T. 122)

... Mr. Goldstein is trying to say that he is so naive. . . . (T. 1.67)

Now, what did Mr. Goldstein and the others do. Well they didn't tell Reigler. (T.1.69)

Mr. Goldstein met with Mr. Mattauch before the Frankfort meeting. He never told Mr. Mattauch about First Liberty being fraud. (T.1.69)

There is no evidence in this case, one way or the other, as to who had the power to sign the checks on NUSI account at the Swiss bank corporation, and there is no evidence in this case one way or another as to what happened to the money that was in that account." (T.1.128) (emphasis added)

This emphasized portion of the argument does not reference that which the Petitioner is alleged to have done or omitted doing during the course of alleged conspiracy. It is a comment on the Petitioner's defenses *urged at the trial*, thus falling within the ambit of conduct proscribed by this Court in *Griffin v. California, op. cit.*

2. The (In-Tandum) Argument.

The government's Brief also ignores the *in tandem* effect of the government's unilateral, unbridled control over the status of the Reible brothers as "indicted co-defendants" depriving the Petitioner of the very witnesses who could exculpate him and thereafter directly commenting on his *personal failure* to explain the evidentiary deficiencies in his case.¹

¹Indeed the government's closing remarks at (T1.128):

"There is no evidence in this case, one way or the other, as to who had the power to sign the checks on this NUSI account at the Swiss bank corporation and there is no evidence in this case one way or the other as to what happened to the money that was in that account. . . ."

Could never be interpreted as a "direct and proper response to (Petitioner's) argument." (Brief in Opposition, pg. 15), since the remarks contravene the government's stipulation in which it conceded that only the Reible brothers were authorized signatories on the NUSI account at the Swiss bank corporation.

CONCLUSION

Unanswered is the question of the degree of discretion and manipulation this Court will allow the government to posture the defense's ability to procure the testimony of willing but unavailable defense witnesses through Rule 15(a), *supra* depositions. To date, that discretion is unbridled and, as evidenced herein, abusive. Also, unanswered is the tolerance to be afforded the government to both manipulate that evidence otherwise available to a defendant, and then comment in summation on the deficiencies in his or the "defense's" evidence. The government's Brief in Opposition has ignored these questions but they are certainly worthy of this Court's full consideration. The writ of certiorari herein sought should be granted by this Court.

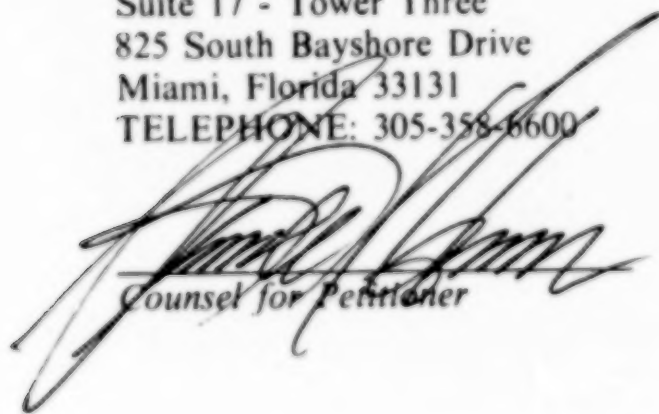
Respectfully Submitted,

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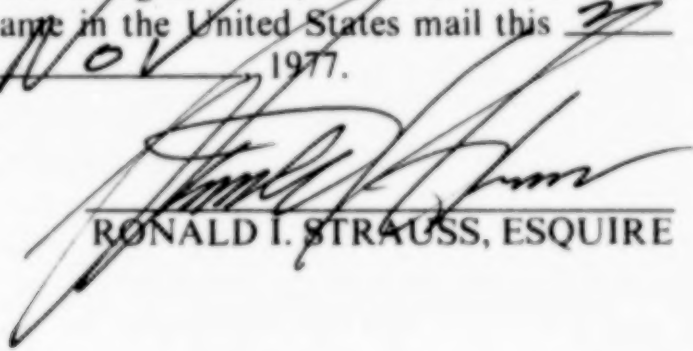
TELEPHONE: 305-358-6600



Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Petitioner's Reply to Brief in Opposition were served on: WADE H. MCCREE, JR., (4 Copies), Solicitor General of the United States, United States Department of Justice, Washington, D.C., 20530, ROBERT LEE GUTHRIE, Atty. for Petitioner Nikoloric, 1410 Republic National Bank Building, Dallas, Texas, 75201; THEODORE KLEIN, ESQUIRE, Atty. for Petitioner Dearden, Jr., 2401 Douglas Road, Coral Gables, Florida, by depositing same in the United States mail this Nov day of 7, 1977.


RONALD I. STRAUSS, ESQUIRE

Supreme Court, U. S.

FILED

NOV 3 1977

MICHAEL RODAK, JR., CLERK

in the
Supreme Court
of the
United States

OCTOBER TERM, 1976

CASE NO. 76-1440

ALEX GOLDSTEIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PETITIONER'S PETITION FOR REHEARING

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PETITIONER'S PETITION FOR REHEARING

Pursuant to Rule 58(2), *Rules of The Supreme Court*,
the Petitioner herein, ALEX GOLDSTEIN, by and
through his undersigned attorneys, hereby petitions this

Court for a rehearing on its denial of the original Petition for a Writ of Certiorari to the United States Court of Appeals, for the Fifth Circuit, in support of which the Petitioner urges that there exists grounds constituting intervening circumstances of a substantial or a controlling effect, or other substantial grounds available to, although not previously presented by the Petitioner. More particularly, the Petitioner asserts:

1. This Court for purposes of this representation and assertion, is respectfully referred to the Petition for Stay of Mandate previously filed with this Court, on behalf of ALEX GOLDSTEIN, wherein it was asserted, with documentary attachments, that there is a pending similar and like criminal trial currently underway in Germany. The undersigned has received definitive information, not yet documented, that the Government of the United States has granted "freedom of passage" to the Reible Brothers, in order for the German Court and its personnel, to travel to the United States to take sworn testimony for purposes of the trial in Germany. Again, it is emphasized, that the United States Government therefore can manipulate and control the testimony of witnesses, especially material and essential witnesses such as the Reible Brothers, wherein at one period of time, prohibiting the travel of the Reible Brothers to the United States, suggesting said Reible Brothers are fugitives, and, on the other hand, allowing the Reible Brothers to come to the United States with their attorneys, and German Court's personnel waiving the United States Government's rights under the outstanding indictment remaining pending against the Reible Brothers. The undersigned represents to this Court, as set forth in the correspondence to German counsel, Appendix A, *infra* (p. 7), that diligent efforts are being made at this time to obtain the documentary evidence to establish the Government's

written permission for the Reible Brothers to travel with freedom in the United States without fear of arrest or detention.

2. The representation set forth hereinabove, therefore, adds imperative emphasis to the question presented to this Court, as to the unbridled latitude of the United States Government to manipulate witnesses, as more fully discussed in the reply brief, which was being processed and printed at the time this Court entered its order denying the application for the Petition for Certiorari in this case.

The bases of fact, citations, authorities and arguments more fully set forth in the Petitioner's Reply Argument, attached hereto and incorporated herein by reference for all purposes should be considered by this Court in rehearing, its original denial of the Petition for Writ of Certiorari and, upon such rehearing, prompt a granting of the Writ and full consideration by this Court of the questions presented heretofore. The Petitioner's Reply to Brief in Opposition has been prepared and printed prior to counsel's receiving this Court's order denying a Writ of Certiorari as requested but could not be mailed to the Clerk in time so as to precede the Court's original denial. Nevertheless, the basis in opposition to the Government's opposition to granting the Writ should be considered by this Court.

Respectfully Submitted,

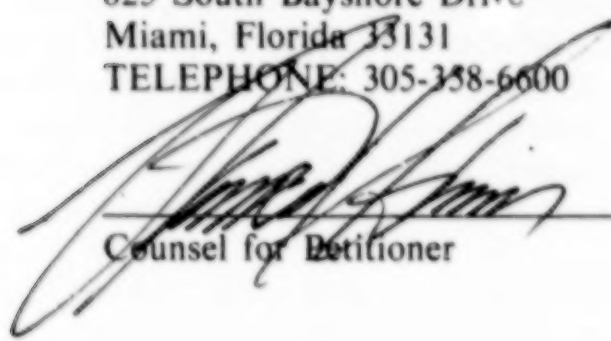
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Counsel for Petitioner

**CERTIFICATE REQUIRED BY RULE 58, RULES OF
THE SUPREME COURT**

The undersigned counsel for the Petitioner herein,
ALEX GOLDSTEIN, hereby certify that the arguments,
authorities and facts, urged upon the Court in the Petition
for ReHearing, including those portions expressly incor-
porated herein by reference, are presented in good faith and
not for purposes of delay.

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BY

RONALD L. STRAUSS, ESQUIRE

Counsel for the Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Petitioner's Petition for Rehearing were served on: WADE H. MCCREE, JR., (4 Copies), Solicitor General of the United States, United States Department of Justice, Washington, D.C. 20530, ROBERT LEE GUTHRIE, Att. for Petitioner Nikoloric, 1410 Republic National Bank Building, Dallas, Texas, 75201; THEODORE KLEIN, ESQUIRE, Atty. for Petitioner Dearden, Jr., 2401 Douglas Road, Coral Gables, Florida, by depositing same in the United States mail this 2 day of Nov, 1977.


RONALD I. STRAUSS, ESQUIRE

APPENDIX A

October 28th, 1977

Werner Foerster, Esquire
62 Wiesbaden-Sonnenberg
Danziger Str. 85
Germany

Re: U.S.A. vs. ALEX GOLDSTEIN
Our File No. 75-37/RIS

Dear Werner:

As you may be aware, the United States Supreme Court denied the Petition for Writ of Certiorari, currently pending before that Court. A Copy of the brief submitted on behalf of Alex Goldstein, the brief submitted by the Government, and the reply brief, as well as the Petitioner's Petition for ReHearing is attached hereto for your perusal.

Alex Goldstein has advised the undersigned, via telephone, that the pending German criminal trial, involving the Reible Brothers, Alex Goldstein, and others, has reached the status wherein the Court, including judges, attorneys and defendants will be traveling to the United States to obtain sworn testimony from witnesses located here.

It is imperative, that I obtain, *most expeditiously*, a copy of the United States Government's written permission, or document, allowing the Reible Brothers to travel freely in the United States, which I understand has been filed through the German prosecutor's office. A copy of this correspondence has been submitted to the Clerk of the United States Supreme Court as part of our petition for rehearing.

Thank you for your cooperation and expeditious response.

Very truly yours,

Ronald I. Strauss

RIS:ndp